No. 10792.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY ASHTON, as Trustee in Bankruptcy of the Estate of Charles Ralph Sentney,

Appellant,

vs.

CHARLES RALPH SENTNEY,

Appellee.

BRIEF OF RESPONDENT CHARLES RALPH SENTNEY.

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Statement of Facts.

We, as did the District Judge, adopt the Findings of the Referee as the facts. They are and we quote:

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

"The trustee herein, having filed his petition seeking an order vacating and setting aside the discharge of the bankrupt, and also having filed his petition seeking an order requiring the bankrupt to turn over to the trustee, as an asset of the estate, the interest of the bankrupt and the inheritance of the bankrupt under a trust known as Trust No. 245, The First National Bank of Santa Ana, California, Trustee, and the bankrupt having filed his answers to said petitions and the returns to the orders to show cause issued thereon, and the matters having come on regularly for hearing before the Referee in Bank-

ruptcy, the trustee being personally present and represented at said hearing by his counsel, Earl E. Moss, Esq. and Louis Lombardi, the bankrupt being represented by his counsel, Rupert B. Turnbull and Martin Goldman, and the First National Bank of Santa Ana, California, being represented by A. M. Bradley, Esq., its attorney, and evidence, oral and documentary, having been introduced by the parties, and it having been stipulated by counsel for the respective parties that all the evidence offered might be considered as evidence on each of the petitions and orders to show cause, and the matters having been submitted to the Referee on briefs, and the respective parties having filed heir briefs, and the same having been considered by the Court, the Court now makes its Findings of Fact with respect to the trustee's seeking order revoking the discharge of the bankrupt. The Court finds, with respect to [139] the petition of the trustee seeking an order revoking the discharge of the bankrupt, as follows:

I.

That on the 16th day of October, 1942, the above-named bankrupt filed in the above-entitled court a voluntary petition in bankruptcy, duly signed by him and verified before a notary public, and on said date an order of adjudication was duly entered.

II.

That on the 4th day of November, 1942, Harry Ashton was duly appointed Trustee in Bankruptcy of the estate of said bankrupt and thereafter qualified as such trustee and ever since has been and now is the duly appointed, qualified and acting trustee of the estate of said bankrupt.

III.

That on the said 16th day of October, 1942, there was in existence a certain trust known as Trust No. 245, created by W. A. Huff and Edith Huff as trustors, and the First National Bank of Santa Ana, as trustee, and on said date the bankrupt was one of the beneficiaries therein. That said trust contained, among others, the following provisions:

> "Each and every beneficiary under this trust is hereby restrained from, and shall be without right, power and/or authority to sell, transfer, pledge mortgage, hypothecate, alienate, anticipate, or in any other manner affect or impair his or her beneficial and/or legal rights, titles, interests, claims and/or estates, in and/or to the income and/or principal of this trust during the entire term thereof, nor shall the rights, titles, interests, and/or estates of any beneficiary hereunder be subject to the rights or claims of the creditors of any beneficiary nor subject nor liable [140] to any process of law or Court upon the claim of any such creditor, and all the income and/or principal under this trust shall be transferable, payable and/or deliverable, only, solely, *exlusively,* and personally to the herein designated beneficiaries, or their lawful guardian or guardians hereunder at the time they are entitled to take the same under the terms of this trust, and the personal receipt of the designated beneficiary hereunder, or their lawful guardian, shall be a condition precedent to the payment or delivery of the same by said Trustee.
>
> "12.
>
> "The said Trustors herein named reserve to themselves the exclusive possession and use and enjoyment in, and all rights to, the rents, issues and profits

> of all the property herein set forth in Exhibit "a", and all other properties that may be hereafter transferred, assigned, set over or *conveyed* to the Trustee, and each of said properties, for and during the term of the natural lives of both of said Trustors herein named; and it is further understood that this trust, being gratuitously created by said Trustors hereinbefore named, the right and power is hereby reserved unto said Trustors to revoke or amend this trust, in whole or in part, at any time, at their pleasure, during the lives of both of said Trustors, by request in writing addressed and delivered to said Trustee; and the Trustors further reserve the right to revoke any or all of said transfers, assignments or conveyances as to any of the property in Exhibit 'A' described, [141] or any other property which may be transferred, assigned on conveyed to said Trustee under this trust, . . ."

and an amendment to the Declaration of Trust executed on August 3, 1935, after mentioning a number of beneficiaries, contains the following:

> " 'After payment of the funeral expenses, expenses of last illness and legal debts of the trustor, Edith Huff, together with the payments of the sums provided in subdivisions "First" to "Seventh", both inclusive, the balance of said one-half of the entire trust estate then remaining in the hands of the trustee shall be distributed, disposed of and handled in the following manner:
>
> " 'An equal one-third share of said portion of the trust estate then remaining shall be distributed to Bernice Lutz, niece of said trustor, Edith Huff. Should said Bernice Lutz be not surviving at the death of said Edith Huff, but be survived by bodily

issue, then said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to said bodily issue per stirpes. Should said Bernice Lutz not be surviving and not be survived by bodily issue, then said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to Ralph Sentney, brother of said Bernice Lutz, and should said Ralph Sentney be not surviving at said time, then one-fourth of said portion of said estate so to be distributed to Bernice Lutz shall be distributed to William Arthur Lutz, the husband of said Bernice Lutz, and the balance of said portion of said estate [142] shall become a part of the trust estate' ", etc.

" 'An equal one-third share of said portion of the trust estate then remaining shall be distributed to Ralph Sentney, nephew of said Edith Huff. Should Ralph Sentney be not surviving at the date of death of said Edith Huff, but be survived by bodily issue, then that portion of said estate so to be distributed to said Ralph Sentney shall be distributed to the bodily issue of said Ralph Sentney per stirpes. If, however, said Ralph Sentney be not surviving and not be survived by bodily issue, then said portion of said estate shall be distributed to Bernice Lutz, the sister of said Ralph Sentney, and should said Bernice Lutz be not surviving at said time, and should said Ralph Sentney be not survived by bodily issue, then one-half of said portion of said estate so to be distributed to said Ralph Sentney shall be distributed to the wife of said Ralph Sentney, if he is married, and said wife is living with him and no proceedings for divorce or separate maintenance be pending between them at the time of the death of said Ralph Sentney,' " etc.

IV.

That Charles Ralph Sentney, the bankrupt herein, and Ralph Sentney mentioned in said trust are one and the same person.

V.

That the surviving trustor in said trust, said Edith Huff, the aunt of the bankrupt, died on April 20, 1943, more than six months after the date of adjudication herein.

VI.

That Schedule B-4 of the schedules in bankruptcy, signed [143] and verified by the bankrupt and attached to his petition in bankruptcy herein is as follows:

Harry Ashton, as Trustees, etc. v. Sentney.

Schedule B-4

Property in reversion, remainder or expectancy, including property held in trust for the Debtor or subject to any power or right to dispose of or to charge.

(N. B.—A particular description of each interest must be entered, with a statement of the location of the property, the names and description of the persons now enjoying the same, the value thereof, and from whom and in what manner debtor's interest in such property is or will be derived. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized as the proceeds thereof, and the disposal of the same, as far as know to the debtor.)

General Interest	Particular Description	Estimated value of Interest
Interest in Land		Dollars Cents
	None	
Personal Property		
	None	
Property in Money, Stock, Shares, Bonds, Annuities, etc.		
	None	
Rights and Powers, Legacies and Bequests		
	None	
	Total	None

VII.

That no mention was made by said bankrupt at any place in said schedules, or his statement of affairs filed concurrently therewith, of the existence of said trust. That the bankrupt, for many [144] years prior to said 16th day of October, 1942, knew of the existence of said trust and the provisions thereof. That shortly prior to the filing of the petition herein, the bankrupt procured a copy of the Declaration of Trust with the amendments thereto, and submitted the same to Martin Goldman, his attorney in this proceeding, and said Martin Goldman prepared a brief to determine whether or not the law required the bankrupt to describe said interest in said trust in the schedules in bankruptcy, which said brief consists of the first three pages of "Trustee's Exhibit 2" in this proceeding. That both before and after the preparation of

said brief, the said bankrupt and his said attorney, Martin Goldman, discussed in detail the question of the necessity of describing said interest in said trust in the schedules in bankruptcy. That after making said search of the law and preparing a brief thereon, said Martin Goldman advised the bankrupt that there was no property right in said trust which should, or ought to be, described in said schedules.

VIII.

That at the first meeting of the creditors of said bankrupt, held on the 4th day of November, 1942, the said bankrupt testified as a witness and did not reveal the existence of said trust and his interest therein.

IX.

That an order was made by the above-entitled court on the 9th day of December, 1942, granting said bankrupt a discharge; that neither the trustee of said bankrupt's estate nor the creditors thereof, nor the court knew of the existence of said trust prior to about the first day of September, 1943. That on October 7, 1943, the trustee of said bankrupt's estate filed a petition for an order revoking the bankrupt's discharge.

From the foregoing findings of fact, the court makes the following conclusions of law:

I.

That at the date of the filing of the petition in bank- [145] ruptcy, and for a period of six months continuously thereafter, and for a period of six months after the adjudication of bankruptcy herein, and during all of said times, the bankrupt had no property interest in Trust No. 245, the First National Bank of Santa Ana,

Trustee, which the bankrupt could by any means have transferred, and that there was no property in said Trust which could or did pass by operation of law to Trustee in bankruptcy.

II.

That the interest of the bankrupt in the said trust, as above set forth on the date of the filing of the petition in bankruptcy, should have been described by the bankrupt in Schedule B-4 of his schedules in bankruptcy, regardless of the fact that the interest did not pass to the Trustee.

III.

That the bankrupt was not guilty of any bad faith or concealment of assets or knowingly or intentionally making a false oath.

IV.

That the petition of the trustee for an order revoking the discharge of the bankrupt should be denied and said petition dismissed.

Findings of fact with respect to the petition of the trustee for an order to show cause requiring an order declaring that the estate of the bankrupt and the trustee are the owners of a beneficial interest in Trust No. 245, First National Bank of Santa Ana, California:

I.

The Court finds it is not true that at the time of the filing of bankrupt's petition herein, on the date of the adjudication in bankruptcy of the bankrupt herein or at any time during the six months' period immediately succeeding the adjudication of the bankrupt herein, or at any of said times the bankrupt had any property interest as the beneficiary or otherwise in Trust No. 245, the

First National Bank of Santa Ana, California, Trustee, which he, the bankrupt, could have by any means transferred, or which pass by operation of law to [146] Trustee in bankruptcy.

II.

The Court finds that there was a Trust created by W. A. Huff and Edith Huff during their lifetime with the First National Bank of Santa Ana, as Trustee, known as Trust No. 245; that said Trust was a Spendthrift Trust with the absolute right in the donors or one of the donors on the death of the other to change and vary the terms thereof.

III.

The Court finds that the trustee in bankruptcy, on the date of the commencement of this proceeding, and for six months thereafter, did not acquire any right, title or interest as an asset in the within bankrupt estate in said trust, and the court further finds that, under the provisions of Section 70 (A) 5 of the Bankruptcy Act, the said interest of the bankrupt in said trust was not such property right as would be vested in the trustee.

From the foregoing findings of fact, the court makes the following conclusions of law:

I.

That the petition of the trustee for an order determining that the First National Bank of Santa Ana, California, and the bankrupt herein should be required to convey to the trustee in bankruptcy the bankrupt's alleged beneficial interest in said Trust No. 245 should be denied.

II.

The Court concludes that Harry Ashton, Trustee in bankruptcy herein is not the owner of the bankrupt's beneficial interest in Trust No. 245, or any proceeds which he may ultimately recover therefrom, either as an heir-at-law of Edith Huff or an ultimate beneficiary under the terms of the Trust No. 245, as created by W. A. Huff and Edith Huff, donors, with the First National Bank of Santa Ana, California, Trustee, known as Trust No. 245.

It Is Therefore Ordered as Follows:

That the petition of the Trustee for an order vacating [147] and setting aside the discharge of the bankrupt be and hereby is denied.

That the petition of Trustee, Harry Ashton, herein for an order determining that the bankrupt and the First National Bank of Santa Ana, California, have no interest in Trust No. 245, and that the same be conveyed to the Trustee, Harry Ashton, be, and hereby is denied, and the order to show cause issued on said petition is dismissed.

That the petition of the Trustee, Harry Ashton, seeking the determination, that he as Trustee in bankruptcy herein is entitled to the beneficial interest and any and all beneficial interests in bankruptcy in Trust No. 245, be and hereby is denied, and

It is determined, concluded and found that the estate of the bankrupt and the Trustee thereof, have no right, title or interest in said Trust No. 245 or any of the property thereof.

Dated this 24th day of January, 1944.

Hubert F. Laugharn
Referee in Bankruptcy."

Argument and Authorities.

The attorneys for the bankrupt and appellee prepared carefully the authorities in this matter and these authorities are reviewed in the order of December 6, 1943, of the Honorable Hubert F. Laugharn, Referee in Bankruptcy. That order together with the authorities we present is our argument in support of the order appealed from. It follows:

Order.

"The debtor's voluntary Petition in Bankruptcy, Schedules and Statement of Affairs were filed herein on October 16, 1942, on which date he was adjudicated a voluntary bankrupt.

On the date of his adjudication there was in existence a certain Trust No. 245 created by W. A. Huff and Edith Huff as Trustors and The First National Bank of Santa Ana, California, as Trustee. The Declaration of Trust set forth the within bankrupt as one of the beneficiaries.

The pertinent provisions of the trust which have a bearing upon the determination of the within problem are the following:

"11.

"Each and every beneficiary under this trust is hereby restrained from, and shall be without right, power and/or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate ,or in any other manner affect or impair his or her beneficial and/or legal rights, titles, interests, claims and/or estate in and/or to the income and/or principal of this trust during the entire term thereof, nor shall the rights, titles, interests, and/or estates of any

beneficiary hereunder be subject to the rights or claims of the creditors of any beneficiary nor subject nor liable to any process of law or Court upon the claim of any such creditor, and all the income and/or principal under this trust shall be transferable, payable and/or deliverable, only, solely, exclusively, and personally to the herein designated beneficiaries, or their lawful guardian or guardians hereunder at the time they are entitled to take the same [121] under the terms of this trust, and the personal receipt of the designated beneficiary hereunder, or their lawful guardian, shall be a condition precedent to the payment or delivery of the same by said Trustee.

"12.

"The said Trustors herein named reserve to themselves the exclusive possession and use and enjoyment in, and all rights to, the rents, issues and profits of all the property herein set forth in Exhibit 'A', and all other properties that may be hereafter transferred, assigned, set over or conveyed to the Trustee, and each of said properties, for and during the term of the natural lives of both of said Trustors herein named; and it is further understod that this trust, being gratuitously created by said Trustors hereinbefore named, the right and power is hereby reserved unto said Trustors to revoke or amend this trust, in whole or in part, at any time, at their pleasure, during the lives of both of said Trustors, by request in writing addressed and delivered to said Trustee; and the Trustors further reserve the right to revoke any or all of said transfers, assignments or conveyances as to any of the property in Exhibit 'A', described, or any other property which may be transferred, assigned or conveyed to said Trustee under this trust, . . ."

and an amendment to the Declaration of Trust executed on August 3, 1935, after mentioning a number of beneficiaries, contains the following:

> " 'After payment of the funeral expenses, expenses of last illness and legal debts of the trustor, Edith Huff, together with the payments of the sums provided in subdivisions 'First' to 'Seventh', both inclusive, the balance of said one-half of the entire trust estate then remaining in the hands of the trustee shall be distributed, disposed of and handled in the following manner:
>
> " 'An equal one-third share of said portion of the trust estate then remaining shall be distributed to Bernice Lutz, niece of said trustor, Edith Huff. Should said Bernice Lutz be not surviving at the death of said Edith Huff, but be survived by bodily issue, then [122] said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to said bodily issue per stirpes. Should said Bernice Lutz not be surviving and not be survived by bodily issue, then said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to Ralph Sentney, brother of said Bernice Lutz, and should said Ralph Sentney be not surviving at said time, then one-fourth of said portion of said estate so to be distributed to Bernice Lutz shall be distributed to William Arthur Lutz, the husband of said Bernice Lutz, and the balance of said portion of said estate shall become a part of the trust estate' ", etc.
> " 'An equal one-third share of said portion of the trust estate then remaining shall be distributed to Ralph Sentney, nephew of said Edith Huff. Should Ralph Sentney be not surviving at the date of death of said Edith Huff but be survived by bodily issue, then that portion of said estate so to be distributed

to said Ralph Sentney per stirpes. If, however, said Ralph Sentney be not surviving and not be survived by bodily issue, then said portion of *of* said estate shall be distributed to Bernice Lutz, the sister of said Ralph Sentney, and should said Bernice Lutz be not surviving at said time, and should said Ralph Sentney be not survived by bodily issue, then one-half of said portion of said estate so to be distributed to said Ralph Sentney shall be distributed to the wife of said Ralph Sentley, if he is married, and said wife is living with him and no proceedings for divorce or separate maintenance be pending between them at the time of the death of said Ralph Sentney,' " etc.

Charles Ralph Sentney, the within bankrupt, and the "Ralph Sentney" referred to hereinabove are one and the same.

The said trustor, Edith Huff, the aunt of the bankrupt, died on April 20, 1943, which date was more than six months after the date of adjudication herein.

The schedules of the bankrupt contain no reference to the interest of the bankrupt in the said trust, although it appears that [123] at the time of the preparation and filing of his schedules he had full knowledge of the said interest.

The Order of Discharge was made herein on December 9, 1942.

On October 7, 1943 the trustee filed herein a petition for an order revoking the discharge and a petition for an order requiring the bankrupt to show cause why the trustee should not be determined to be the owner of the bankrupt's beneficial interest in the said trust. Orders to

Show Cause were issued upon the filing of the said petitions and upon the hearing thereon evidence both oral and documentary was introduced by the respective parties.

Passing for later consideration the effect of the "spendthrift" and non-assignability provisions of the said Declaration of Trust, we shall consider the nature of the interest and estate of the bankrupt as of the date of his adjudication in bankruptcy.

The bankrupt was named to receive distribution of two separate interests:

(1) One-third share of the remaining portion of the trust which was to go to Bernice Lutz, the bankrupt's sister and the niece of the trustor, and should the said niece not be surviving at the death of the said Edith Huff and not be survived by bodily issue, then the said portion was to be distributed to the bankrupt should he be surviving at the time.

(2) An equal one-third portion of the remaining trust estate to the bankrupt should he be surviving at the date of death of said Edith Huff.

Bernice Lutz, the bankrupt's sister, was surviving at the date of death of the said Edith Huff and therefore we need give no further concern to the said first interest.

The bankrupt was surviving at the date of death of the said Edith Huff. His said interest which we are now considering was subject to

(1) The right of the trustor to revoke, change or eliminate altogether the beneficial interest of the bankrupt. This she did not do. While the exercise of this right could well have reduced, enlarged or entirely

eliminated the interest of the bankrupt, the trust was not destroyed by the said reservation.

California Jurisprudence "Trustee", Volume 25, at Section 149:

> "The individual, in conveying or transferring property in trust, may properly reserve a power of revocation; nor is the trust destroyed by such a reservation . . .
>
> The provisions of the trust instrument remain operative until the power is exercised."

In fact, unless the trust is expressly made irrevocable by appropriate terms in the declaration, the same is now by statute revocable by the trustor. (Civil Code, Section 2280.)

A grantor may reserve in a deed a right to revoke. Such reservation is not prohibited by law. (*Tennant v. John Tennant Memorial Home,* 167 Cal. 570.)

A trust containing power of revocation is good until acted upon. (*Nichols v. Emery,* 109 Cal. 323.)

Likewise, if a trust contains the power of appointment, the particular interests created stand unless the power is used. (*In re Wetmore,* 108 F. 520, Third Circuit (Penn.); *Crockanthorp v. Sickles,* 156 App. Div. 753, 141 N. Y. Supp. 370.)

Therefore, we may disregard the point (1) above, raised by the bankrupt, that he had no interest for the reason that the same might be changed or eliminated altogether by the act of the trustor.

(2) The interest of the bankrupt would be defeated should he predecease his aunt.

A perplexing problem is presented when we seek to name and define the interest and estate of the bankrupt.

22 Cal. Jur., "Remainders and Reversions":

"Sec. 1. 'Remainder' — 'Executory Interest' — 'Conditional Limitation.'—In respect of the time of their enjoyment, estates or interests in property are either present or future. A future estate which is limited to commence upon the expiration of a preceding or primary estate is designated as an estate or interest in remainder; . . ."

"Sec. 3. 'Vested' and 'Contingent' Estates and interests.—Referring to the nature of future estates, it has been said with much truth that 'there is no subject of the law more abstruse or in which greater refinement of learning has been displayed.' The Civil Code classifies such estates and interests as being either 'vested' or 'contingent', and supplies general definitions as to the meaning of these terms; but it is to be noted that the words in question are in common use in several branches of the law, and that their meaning is varied by the particular legal right or situation to which they are applied. The words have no meaning which is common to all situations; and much confusion of thought and misunderstanding has resulted from an assumption that they have a definition which is of universal application. In respect of the creation and attributes of future estates, the terms 'vested' and 'contingent' are employed in the law of perpetuities to denote alienability and inalienability, and in the law of deeds and wills to describe interests which are descendible, devisable and alienable, and those which have not this quality. In these connections the words in question have reference to ownership as being dependent upon the survival of the person who is named as the taker of the

future estate or interest. If ownership is dependent upon survival, the estate is contingent; if ownership is not dependent upon survival, the estate is vested."

'Sec. 10. Provision for Defeasance—Revocation by Grantor. In creating a future estate or interest the owner of the property may provide for its defeasance; nor is the estate invalidated merely because it is defeasible. Accordingly, it is held that a deed of an estate in remainder is not to be held valid by reason of the fact that it contains a clause reserving to the grantor a power to revoke the grant. But the individual, by the creation of future estates which are limited to take effect at the termination of a beneficial life estate in himself, may preclude himself to revoke the trust and destroy the future estates. Nor is it material whether the future estates are 'vested' or 'contingent' in any of the senses in which these terms are used."

"Sec. 11. The law recognizes a right in the individual to create future estates or interest which are conditional or contingent, . . ."

"Sec. 13. . . . Furthermore although the estate is contingent upon the survival of the person who is named as taker, it is considered to be alienable and subject to the claims of creditors. The assignee or creditor becomes substituted for the designated person, and his right to the property is dependent upon such person's survival at the time when the estate is limited to take effect in possession or enjoyment. . . ."

"Sec. 14. Breach of Condition or Happening of Contingency. Being limited to take effect upon the happening of a contingent event, or upon nonperformance of a lawful condition by the taker of the primary estate, the future estate or interest becomes

vested in ownership upon the occurrence of the event . . ."

"Sec. 21. . . . It has long been settled, however, that an estate is descendible, devisable and alienable, although possession of the property may be postponed until a future time,—and although it is subject to being cut off or defeated by the occurrence of a contingent event or situation. The statute provides that 'future interests pass by succession, will and transfer, in the same manner as present interest.' . . . But the law does not recognize as an estate or interest 'a mere possibility' that a person may acquire property,—such as the expectancy of an heir apparent,—and the 'possibility' or expectation of ownership is deemed not to be a subject of transfer or alienation."

The nature and extent of the interest is to be determined by California statutes. (*Eaton v. Boston Safe Deposit & Trust Company,* 240 U. S. 427; 36 A. B. R. 701; *Nichols v. Eaton,* 91 U. S. 716.)

The interest here is obviously more than a plain expectancy or a possibility and it cannot be considered in the same status as the hope of an heir to inherit by will or succession where there has been no death at the time of bankruptcy. (*In the Matter of First National Bank & Trust Company of Elmira,* 34 A. B. R. (N. S.) 806.)

The argument of counsel for the bankrupt that the interest is a mere expectancy such as the right of a beneficiary under an insurance policy where the insured is still living, is not applicable here.

". . . a possibility, a hope of an heir of a person still living, or of a beneficiary under an insurance policy which is subject to change of beneficiary, does

> not pass to the trustee in bankruptcy. Such interests are not property." (*Matter of First Nat. Bank & Trust Co.,* 34 A. B. R. (N. S.) 806, at 810.)

The interest, even though contingent, and in that sense not "vested", being an interest to be received in possession upon the death of the testator, would pass to the trustee. (*Noonan v. State Bank of Livermore,* 20 A. B. R. (N. S.) 642.)

The interest in question is a future estate. Civil Code Sec. 767:

> "A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time."

Likewise, it is a remainder interest. Civil Code Sec. 769:

> "When a future estate . . . is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name."

and a remainder estate may be limited upon the happening of an event as here upon the demise of the said Edith Huff within the lifetime of the bankrupt.

Assuming that the Declaration of Trust did not contain the "spendthrift" and "nonassignment" provisions, the trustee would then take the said interest of the bankrupt; and this is so even though the trustor might revoke the interest or the bankrupt might predecease the trustor.

In the Matter of St. John, 105 F. 234 (District Court of New York), property was given to trustees, the income to the daughter for life, the principal on her death

to be divided between her children; if none surviving her, between testator's two sons. The daughter was still alive upon the bankruptcy of one of the sons. The bankrupt contended that the interest was a contingent remainder dependent upon two contingencies: (1) if the daughter left survivors, and (2) upon the bankrupt's surviving the sister. The court held that the interest of the bankrupt passed to his trustee, the case determining that the interest of the bankrupt is an expectant estate. The bankrupt's estate is a future estate limited to commence in possession at a future time, on the death of the daughter and on the contingency that she die without child surviving. Section 28 (New York): "Where a future estate is dependent on a precedent estate, it may be termed a remainder"; and Section 30 holds a remainder vested "where there is a person in being who would have an immediate right to the possession of the property on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain." The Court stated:

> "The fact that the possession of the estate depends upon a future contingency which may never happen, although it lessens materially the value of the estate, does not destroy its character as a vested interest which passed to the trustee."

Likewise, under the Michigan law the expectant interest of the bankrupt in corpus funds, although contingent upon bankrupt's survival of life beneficiary vests in the trustee. (*Horton v. Moore*, 42 A. B. R. (N. S.) 485).

Such interest likewise passes in Maryland. (*Matter of Moore,* 10 A. B. R. (N. S.) 568.)

A remainder interest even though the same may be lost passes to the trustee. (*Dudley, Jr. v. Tucker,* 6 A. B. R. (N. S.) 95.)

Even though the possession or enjoyment may be contingent upon the survival of the taker, the estate is nevertheless vested. (*Estate of Ritzman,* 186 Cal. 567.)

And it is considered alienable and subject to the claims of creditors. (*Newlove v. Mercantile Trust Co.,* 156 Cal. 657.)

Although the person named as the taker of the future estate does not have the right to *claim* the property until the contingent event or situation shall have happened or arisen. (*Estate of Glann,* 177 Cal. 347.)

And unless by the provisions of the trust instrument the beneficiary is restrained, he has a right to assign his interest. (*Title Ins. & Trust Co. v. Duffill,* 191 Cal. 629.)

Noonan v. State Bank of Livermore, 20 A. B. R. (N. S.) 642 (State of Iowa):

> "If it is held that the interest . . . was a contingent remainder, then under federal statute, the question arises: Could the plaintiff 'by any means have transferred' his interest in this property? We have settled this question in the case of McDonald v. Bayard Savings Bank, 123 Iowa 413, 98 N. W. 1025, where we held, in fact, that the contingent interest of a remainderman is such a present and existing one as to be susceptible of conveyance by deed . . . This seems to be the general rule as to rights under contingent remainders."

Sinclair v. Crabtree, 211 Cal. 524: Under 693 Civil Code, future interest is property either vested or contingent, and under 699 Civil Code:

> "Future interests pass by succession, will, and transfer, in the same manner as present interests."

The following are additional cases in which the courts have determined that the interests passed to the trustee in bankruptcy:

In re Wood, 3 A. B. R. 572; 98 F. 972;

In re Peter J. Shenberger, 4 A. B. R. 487; 102 F. 978;

In re Nelson A. St. John, 5 A. B. R. 190; 105 F. 234;

In re Twaddell, 6 A. B. R. 539; 110 F. 145;

In re McHarry, 7 A. B. R. 83; 111 F. 498;

Woods v. Little, 13 A. B. R. 742; 134 F. 229.

Matter of First Nat. Bank & Trust Co., 34 A. B. R. (N. S.) 806:

> "On or about September 29, 1920, Ella M. Brand (hereinafter called the settlor) executed a deed of trust to the Merchants National Bank of Elmira, N. Y. It by merger became the First National Bank and Trust Company of Elmira. By the deed the settlor transferred to the trustee certain personal property and unimproved real property in trust to pay the income to her for life and upon her death, to distribute the principal to named beneficiaries, including her daughter, Mrs. Keeton."
>
> "About January 19, 1933, said Henrietta S. Keeton was, on her voluntary petition, adjudged a bankrupt. James J. O'Connor was duly appointed trustee

in bankruptcy. He demanded the share of Henrietta S. Keeton from the trustee herein. Both Mrs. Keeton and Mr. O'Connor, her trustee in bankruptcy, are parties to this proceeding. Her interest in the trust estate was, in good faith, omitted from the schedules in bankruptcy. Upon her examination she disclosed it. She has not in any way assigned or parted therewith.

"The question for determination is whether Mrs. Keeton's distributive share in remainder passed to her trustee in bankruptcy."

"When Mrs. Keeton was adjudicated bankrupt, the settlor of this trust was living and the trust was in force. Was her beneficial interest in remainder then 'property' which she 'could by any means have transferred?' This question must be determined under the law of the state of New York."

"Section 15 of the Personal Property Law reads:

" 'The right of the beneficiary to enforce the performance of a trust to receive the *income* of personal property, and to apply it to the use of any person, cannot be transferred by assignment or otherwise. *But the right and interest of the beneficiary of any other trust in personal property may be transferred.*'

"Section 59 of the Real Property Law reads: [131]

" 'An expectant estate is descendible and alienable, in the same manner as an estate in possession.'

"We think Mrs. Keeton's interest was 'property' and though not vested in possession was vested. Whether vested or contingent, it was transferable and alienable."

"We are cited to Matter of Hoadley (D. C., N.Y.), 3 Am. B. R. 780, 101 F. 233. Of this case 3 Rem-

ington on Bankruptcy, Sec. 32, says: 'In this case the distinction was drawn between contingency of person and contingency of event.' In the present case the only contingency is as to the event. Even a contingency as to the person does not seem to make a trust interest non-transferable under the later cases above cited."

". . . a possibility, a hope of an heir of a person still living, or of a beneficiary under an insurance policy which is subject to change of beneficiary, does not pass to the trustee in bankruptcy. Such interests are not property. As well said in National Park v. Billings, *supra,* 144 App. Div. 536, 540: 'That which the heir has from the courtesy of his ancestor, and which is nothing more than the mere hope of succession' is not the subject of disposition. 'Mere expectancies and bare possibilities of acquiring property do not pass. They do not constitute property nor title to property.' (3 Remington Bankruptcy, Sec. 1199.) In Matter of Baker (C. C. A., 6th Circ.), 8 Am. B. R. (N. S.) 448, 13 F. (2d) 707, Baker purchased of two brothers their respective expectancies in their mother's estate. *He became bankrupt during his mother's lifetime.* The court held that neither Baker's individual interest nor the interest acquired from his brothers passed to the trustee in bankruptcy."

Where property was left to six sons, no portion to be sold for ten years, the son's share to be forfeited if he contracted bad habits and likewise to be forfeited should the son die before division of property, each son acquired a vested interest subject to divesture upon the happening of the subsequent act and the court determined there was

a vested interest which could be transferred by the devisee. (*Newlove v. Mercantile Trust Company of San Francisco,* 156 Cal. 657.)

Attention is now directed to the "spendthrift" and "non-assignable" provisions of the trust as hereinabove set forth.

California recognizes "spendthrift" trusts. (*Kelly v. Kelly,* 11 Cal. (2d) 356):

> "It is of the essence of a spendthrift trust that it is not subject to voluntary alienation by the *cestui,* nor subject to involuntary alienation through attachment or other process at the suit of his creditors. (McColgan v. Walter McGee, Inc., 172 Cal. 182 (155 Pac. 995, Ann. Cas. 1917D, 1050); Seymour v. McAvoy, 121 Cal. 438 (53 Pac. 946, 41 L. R. A. 544); San Diego Trust etc. Bank v. Heustis, 121 Cal. App. 675 (10 Pac. (2d) 158); Canfield v. Security First Nat. Bank, 8 Cal. App. (2d) 277 (48 Pac. (2d) 133); 1 Bogert, Trusts and Trustees, p. 75; 43 Harvard Law Review, 84; 21 Cal. Law Rev. 142; 22 Cal. Law Rev. 482.)"

Inasmuch as a gift takes nothing from the prior or subsequent creditors of the beneficiary to which they previously had right to look for payment, they cannot complain that the donor has provided that the income be paid personally to the beneficiary or be not subject to the claims of creditors. (4 Cal. Law Review, 426; *McColgan v. Magee, Inc.,* 172 Cal. 182.)

Civil Code 859 may be considered an exception to this doctrine, and where the trust is created to receive the rents and profits of real or personal property, the sum, beyond a fund necessary for the education and support of the

person for whose benefit the trust is created, is liable to the claims of creditors of such persons. (*Canfield v. Security First National Bank,* 8 Cal. App. (2d) 277, and 13 Cal. (2d) page 1.)

Likewise, restraint may be made upon assignment of interest. (*Title Ins. & Trust Co. v. Duffill,* 191 Cal. 629; *Curtin v. Kowalsky,* 145 Cal. 431.)

Unless restrained by the provisions of the trust instrument, the beneficiary has a perfect right to assign his interest. ("Trust," 25 Cal. Jur. 173.)

Where a trust is created for the benefit of another the beneficiary may be restrained by appropriate provisions of the trust instrument from disposing of his trust interest or ownership. (25 Cal. Jur. 174.)

It is insisted by counsel for the trustee that even though the instrument is by its terms nonassignable and is accompanied by provisions deemed appropriate to create a "spendthrift trust," that since in certain instances the bankrupt could make a transfer of the property for a consideration which would be enforced in equity, therefor the "property" was such as the bankrupt (Section 70a (5)) "could by any means have transferred."

This test has been disapproved by the Supreme Court of the United States and it determined that Section 70a (5) which vests the trustee with all the property that the bankrupt "could by any means have transferred" has no application to spendthrift trusts valid and effective against creditors, notwithstanding the beneficiary, under state law as construed by the highest court of the state, may anticipate and assign for his own benefit, to the exclusion of creditors, said power having been determined in effect in a legal exemption in favor of the beneficiary attaching to

and inherent in the property. (*Eaton v. Boston Safe Deposit & Trust Company*, 36 A. B. R. 701; 240 U. S. 427.)

Edith Huff, the Trustor, died more than six months after the filing of the bankruptcy petition herein, therefore the new Section 70a (7) and (8) can have no application here.

> "70a. The trustee . . . shall be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy . . . to all . . . (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were non-assignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) . . . All property which vests in the bankrupt within six months after bankruptcy by bequest, devise, or inheritance shall vest in the trustee . . ."

It will be recalled that Section 70a (5) gives the trustee title to property which the bankrupt "could by any means have transferred or which might have been levied upon and sold," etc.

In some states by application of the state law certain of the interests did not meet the qualifications of subdivision (5) and were determined by the courts not to constitute assets. The said subdivisions (7) and (8) were added which brought the interests into the estate as assets if the condition arose or the death occurred within six months of the filing of the petition.

The trustee points out that the bankrupt should have scheduled the interest. The trustee is, of course, right in connection with this point.

Section 7 (8) of the Bankruptcy Act provides that the bankrupt "shall . . . prepare, make oath to, and file in court . . . a schedule of his property."

Section 30 of the Bankruptcy Act provides that "all necessary rules, forms, and orders as to procedure and for carrying the provisions of this title into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States." Under this section the Supreme Court has prescribed the form of the schedules, and the schedules established by the Supreme Court set forth on Schedule B-4: "Property in reversion, remainder or expectancy, including property held in trust for the Debtor or subject to any power or right to dispose of or to charge."

Eight of the Supreme Court Judges who were sitting at the time the General Orders and Forms were promulgated were on the bench and had previously decided the case of *Pearsall v. Great Northern Railway Co.,* 161 U. S. 646. This decision went to great length in defining vested rights, expectancies, contingent interests, etc., so it can be said that we have rather definite information as to what the Supreme Court intended by Schedule B-4.

I can personally say that after attempting to review many reported cases on the vesting or nonvesting in the trustee of expectancies, vested and contingent remainders, reversions, conditional limitations, rights of entry for conditions broken, executory devises, etc., that it would be an imprudent and hazardous procedure to allow the bankrupt in each instance to make his own determination

as to whether or not the particular interest vested. He is required to list in detail his property which he claims is exempt so that the Court may pass upon the exemption. Likewise he is required to list and schedule those interests, whether they vest in the trustee or not, which are enumerated in Schedule B-4. The scheduling of the same allows the creditors, the trustee and the Court to investigate the particular kind and character of interest and reach a determination as to whether or not the same passes into the Bankruptcy Court. Most certainly the determination should not be left with the bankrupt.

In many cases such as in the instant case there is no record available pertaining to the interest unless the same is supplied by the bankrupt.

Apparently information of the alleged interest came to the creditors after the discharge was granted.

At the first examination of the bankrupt the bankrupt did not reveal the existence of the interest. On the other hand, it must be admitted that he was not asked the direct question as to whether or not he had any such interest.

Counsel for the trustee maintains that the discharge of the bankrupt should be revoked because of the said concealment. He has cited a number of cases, with which I do not disagree, showing the general power of the Court to revoke discharges in instances other than upon grounds set forth in Section 15.

In this case, however, as soon as the bankrupt and his counsel were confronted by the trustee with the information which he had secured in connection with the interest in said trust, they readily admitted the said interest. Counsel for the bankrupt states that at and prior to

the bankruptcy proceedings the bankrupt had presented to him the question of whether or not the said interest was an asset; that he had spent many hours investigating the law on the subject, and that he had rendered an opinion to the bankrupt that the same did not pass to the trustee and was not an asset of the estate and need not be scheduled. At the hearing there was introduced in evidence a brief which had been prepared by the attorney for the bankrupt at the time he originally gave the said advice to the bankrupt when he was preparing the schedules of the bankrupt. I must frankly admit that I agree with his conclusion that the interest is not an asset herein, but I do not agree with his conclusion that the same need not be scheduled. On the other hand, I cannot find that there was any bad faith or concealment. Neither can I find that the bankrupt knowingly or intentionally made a false oath.

Matter of Soroko, 53 A. B. R. (N. S.) 223:

> "Accordingly, it may be assumed that the advice given to the bankrupt by his attorney was erroneous and that the bankrupt has not established that his statements under oath on the two occasions were true. The statute, however, bars a discharge only if a false oath was made 'knowingly and fraudulently,' that is, if the false statement constituted an 'intentional untruth.' In re Slocum (C. C. A. 2nd Cir.), 11 Am. B. R. (N. S.) 16, 22 F. (2d) 282, 285."

In re Wyche, 51 Fed. Supp. 825:

> "To justify a denial of bankrupt's discharge, failure to list assets must have been made or done with a willful and fraudulent intent. Bankr. Act. Sec. 14, Sub. c(1), 11 U. S. C. A. Sec. 32, Sub. c(1)."

". . . the jurisprudence is well established that the act of the bankrupt complained of must have been made or done with a wilful and fraudulent intent to justify denial of bankrupt's discharge. Collier, 14th Ed., Vol. 1, p. 1360, provides: 'In order to justify a refusal of discharge under Sec. 14c (4), it must be shown that the acts complained of were done with an intent to hinder, delay, or defraud his creditors. This intent, moreover, must be an actual fraudulent intent as distinguished from constructive intent.' "

Therefore, both petitions of the trustee are denied.

[Dated]: December 6, 1943.

HUBERT F. LAUGHARN,
HUBERT F. LAUGHARN,
Referee in Bankruptcy."

In addition to the authorities cited in the Referee's order we have found additional authorities since the making of the order. These authorities relate to the question of the failure of the bankrupt to list his interest in property. The authorities are in 52 Fed. Supp. 492 and 52 Fed. Supp. 496, and hold that the omission of assets in schedules of bankruptcy, which is an innocent act, is not a bar to discharge. They are as follows:

"A bankrupt, knowingly and fraudulently failing to list his interest in group insurance plan of federal retirement system in his schedules and statement of affairs, is not entitled to discharge, though his estate is not entitled to his funds in such system, but his failure to list such interest because of mistake, oversight or ignorance does not bar discharge. Bankr. Act Sec. 1 *et seq.;* 11 U. S. C. A. Sec. 1 *et seq.;* Civil

Service Retirement Act, Sec. 14, as amended; 5 U. S. C. A. Sec. 729."

In re Barry, No. 43814, District Court, E. D. New York. Oct. 2, 1943. 52 Fed. Supp. 492.

"A bankruptcy referee erred in sustaining objection to bankrupt's discharge because of her omission of indebtedness to New York City Teachers Retirement System and interest in pension fund thereof from schedules of her debts and property and statement of her affairs, in absence of finding that such information was knowingly and fraudulently omitted. Bankr. Act Sec. 1 *et seq.,* 11 U. S. C. A. Sec. 1 *et seq.*

"(6) The referee has not found that the information sought, which as in this case was of no great consequence, was knowingly and fraudulently omitted by the bankrupt from her schedules and statement of affairs.

"The conclusion seems inescapable that the failure to furnish the information now complained of was not done knowingly, fraudulently, intentionally or maliciously. It was due solely to the bankrupt's ignorance, oversight or mistake.

"(7) The omission of assets in schedules of bankruptcy and in statement of affairs which is an innocent act, such as a mistake, oversight or ignorance, is not a bar to discharge. See In re Taub, 2 Cir., 98 F. 2d 81; Willoughby v. Jamison, 8 Cir., 103 F. 2d 821; Sharcoff v. Schieffelin & Co., 2 Cir., 70 F. 2d 725; In re Lovich, 2 Cir., 117 F. 2d 612, 133 A. L. R. 673."

In re Barry, No. 43815, District Court, E. D. New York. Oct. 2, 1943. 52 Fed. Supp. 496.

At page 14 of his brief, appellant suggests a reference to C. J. S., Vol. 8, p. 1413 for the authority "that the omission was made on advice of counsel does not of itself excuse it." A full reading of the section from which such quotation was taken is directly in point and fully supports respondent's position.

8 *C. J. S.* 1412, Section 519 a(2):

"Omission of Property From Schedule.

A failure by the bankrupt to schedule all his property *with intent to defraud* his creditors is a ground for denial of a discharge.

Since a bankrupt is required to show the utmost good faith and to make the fullest disclosure of his assets, where he knowingly and *designedly* omits assets from his schedule he will be held to have done so with intent to defraud and will be denied a discharge, unless his conduct is satisfactorily explained, even though the amount omitted is small. On the other hand, a mere omission from, or inaccuracies in a bankrupt's schedule not made knowingly and fraudulently, are not ground for refusing him a discharge. *Thus an innocent omission resulting from inadvertence or mistake, such as an honest belief by the bankrupt that he did not own particular property, is not such concealment as will justify denial of a discharge.* (Citing In Re: Servel, 30 F. 2nd 102.) Nevertheless a belief by the bankrupt that property which he owned and possessed was exempt property and therefore need not be scheduled is no excuse for his failure to schedule such property *if it was in fact not exempt.* That the omission was made on advice of counsel does not of itself excuse it. It will be excused for such reasons only if it also appears that the bankrupt stated the facts fully to his counsel and

that the advice of the latter was given and acted upon in good faith with regard to a matter of law only. He is not justified in relying on the advice of his attorney with reference to plain, palpable and transparent facts."

8 *C. J. S.* 1412, Section 519(3):

"Nature of Property or Bankrupt's Interest Therein.

The bankrupt must have an existing and valuable interest in property before denial of a discharge can be predicated on a concealment thereof.

A discharge may be refused a bankrupt where he has knowingly or fraudulently concealed an existing and valuable interest in property. It must appear, however, that the bankrupt has an existing interest in the property in order that the refusal of a discharge may be predicated on a concealment thereof, *and by property herein is meant something that is or ought to be an asset of the bankrupt's estate.* Hence, *a concealment which will bar a discharge cannot be predicated on a failure to schedule property which would not pass to the trustee,* such as exempt property, or property which is pledged for its full value or which has no possible value; and *if the property involved was, in fact, not property of the bankrupt, a denial of a discharge cannot be predicated on a concealment thereof,* even though there is present an intent to conceal because of a mistaken idea of the bankrupt that it was property he did own. * * * *Property acquired after the adjudication does not vest in the trustee, and hence an opposition to a discharge cannot be based on an alleged concealment of such property.*" A failure to schedule the income of a trust fund which is liable to creditors

under the Real Property Law of the State and a refusal to turn over the right to the trustees are not grounds for the denying of a discharge, in view of the fact that, the trustee's right to such income is *doubtful.* (In Re: Buchanan, 215 F. 492.)

That a bankrupt's interest in land is doubtful and that, if it exists, it is or may be, exempt as a homestead are facts entitled to consideration on the question of his fraudulent intent to schedule such interest. (In Re: Todd, 112 F. 315.)

Where doubtful question of law is involved it could not be said that bankrupt had 'knowingly and fraudulently' concealed property from his trustee. (In Re: Wetmore, 99 F. 703.)

The mental operation of thinking property is owned, and desiring to conceal it, when in fact no such property exists, does not fall within any of the prohibitions of that section, which, when speaking of concealed or transferred property, always means something that is or ought to be, (in common parlance) assets of the estate. (In Re: Hughes, 262 F. 500.)"

Appellant suggests that a mere reading of the section on bankruptcy in Corpus Juris Secundum and other authorities dealing with the fraudulent concealment of assets or the criminal liability for such concealment would have dictated a different course to bankrupt and to his attorney, Martin Goldman. It is obvious and is support for the testimony of both bankrupt and his said attorney that no thought of concealment occurred to either of them, that no reference or examination of those sections was made.

The case of *In re MacFarlane,* 45 Fed. (2d) 994, is in point, not for the proposition claimed by appellant, but on the point contended for by respondent, to-wit:

> That the report of the Referee, when approved by the trial judge, is conclusive upon an appellate court unless it appears that there was an obvious error in the consideration of the facts, or a misapplication of some rule of law. The Court, in that case, makes the very interesting observation that, "if the Trustee in Bankruptcy has a valid claim against the trust estate, he may proceed to recover it in a suit against the proper parties in a court of competent jurisdiction. If he has no such claim, there is no merit to his objections to the discharge." That is exactly the situation presented here.
>
> The ruling in support of the finding of the Referee, and the trial judge granting the discharge was, therefore, made *notwithstanding* that, "in reaching this conclusion, we have assumed that it was the duty of the bankrupt to schedule present interest in the trust itself, whether it was subject to administration in the Bankruptcy Court or not."

The case of *Farmers Savings Bank, et al v. Anton,* 1 Fed (2d) 103, cited by appellant, involved actual fraud and actual deliberate concealment of property *belonging* to the bankrupt's estate for the purpose of defrauding creditors. The fraud was found as a fact by the special master. Throughout the case, the Court refers to the concealed property as *"every known asset legally available to creditors"*; "that he should surrender for the benefit of his creditors"; "which should be applied to their (his debts) payment"; "a part of his assets"; "any of his property." The case is not in point for the reason that

the property there was such property as would pass to the Trustee in Bankruptcy, whereas, in the present case, no interest in the property would or could pass to the Trustee in Bankruptcy.

The *Schute case,* 38 Fed. (2d) 769, cited by appellant, is again, one involving property which was in fact an asset which passed to the Trustee in Bankruptcy. The Court referred to property "belonging to the estate."

The case of *Sinclair v. Butt,* 284 Fed. 568, is based upon the omission to schedule property which would belong to the bankrupt at the time of the filing of the schedules, and it was admitted in argument that the oath of the bankrupt was knowingly false.

In re Perel, 51 Fed. (2d) 506, is cited by appellant for the proposition that, advice of counsel on a plain, palpable and transparent fact, that property which he owns without dispute or question does not have to be scheduled, is not a defense. Surely, counsel for appellant does not mean to contend that there could be no question or dispute of the ownership, of the property herein involved, by respondent at the time of filing of his schedules, or that such ownership was a plain, palpable and transparent fact. On the contrary, the plain, palpable and transparent fact was and is that respondent had no right of ownership whatever in the trust.

Appellant does not cite the more pertinent language of the case, to-wit:

> "It is true enough that advice of counsel that certain property does not in fact belong to the bankrupt and need not, therefore, be scheduled with his property, when given upon a full and fair statement of fact is a defense to a charge of fraudulent concealment."

And again that

> "where the question of discharge *vel non* turns upon whether testimony has been fraudulently given or concealment or failure to disclose have been willful and fraudulent, the question of the intent with which the statements were made or the acts done is of the essence of the inquiry. In such case, the demeanor of the bankrupt in the course of the examination, the manner in which he testifies, as much as the things he says, are the important criteria. In such case, the Referee, as special master, hearing the bankrupt's testimony in the various examinations, is in a better position to determine the question of falsity than is the District Judge from the printed record."

In re Brietling, 133 Fed. 146, involves property which the bankrupt "withheld from creditors—which lawfully he should devote to the payment of his debts."

In *Pollack v. Meyer Bros. Drug Co.,* 233 Fed. 861, the Court found as a fact that the interest of the bankrupt in the trust, which had been omitted from the schedules, was such an interest as did in fact pass to the Trustee in Bankruptcy, that such fund constituted a vested remainder. There was a concealment of property to which the Trustee and his creditors *could legally resort.*

In *Duggins v. Heffron,* 128 Fed. (2d) 546, the Referee in Bankruptcy found as a fact that the bankrupt knowingly and fraudulently and with intent to hinder, delay and defraud creditors, concealed—(certain real property by conveying the same to his wife and concealing the fact that his wife held the same in trust for him). The oath of the bankrupt there was false in that he stated that the property had been conveyed upon a consideration to him,

whereas in fact, it had been conveyed without consideration and was a secret trust.

It appears that every case cited by appellant is one in which the property omitted from the schedules or concealed was such property as was legally available for the payment of bankrupt's debts.

Appellant makes much of the brief prepared by counsel for the bankrupt at the time of the filing of the schedules. An examination of the brief will indicate that the only question briefed was whether the interest of the bankrupt in the Huff Trust was an asset that would pass to the Trustee in Bankruptcy. It is submitted that to this the authorities cited in the brief support the position of the bankrupt that such property did not pass to the Trustee in Bankruptcy.

Appellant, at page 28 of his brief, argues for the same rights as were given to the plaintiff in *Kelley v. Kelley.* Be it remembered that in *Kelley v. Kelley,* plaintiff was specifically denied any interest in the trust itself or in the property attempted to be assigned by the defendant to plaintiff, his wife, in violation of the spendthrift provisions of such trust. Plaintiff acquired only a money judgment in an amount equal to the value of the assignment, had it been valid, which judgment could be collected from any other funds of the defendant, *but not from the trust itself.* If appellant here were to secure such a right, such a judgment, out of what funds could he collect his judgment? Certainly not out of the trust funds, since that was specifically denied in the *Kelley* case; not out of any funds or property belonging to the bankrupt at the time of his bankruptcy, since all of such property already belonged to appellant by virtue of the fact of bankruptcy. The only other source would necessarily have to be prop-

erty which the bankrupt might acquire after his discharge in bankruptcy. To permit a Trustee in Bankruptcy to acquire a claim against the bankrupt collectible out of property acquired after discharge in bankruptcy would defeat the very purpose of the Bankruptcy Act. To follow appellant's argument to its logical, but absurd, conclusion, we must be prepared to hold that a Trustee in Bankruptcy could in every instance force a bankrupt to make an assignment of future earnings or after acquired property, thereby continuing his debts, listed in his schedules, into the future and, in effect, denying the bankrupt all of the benefits specifically granted to him under the Bankruptcy Act.

We respectfully submit that both the Referee in Bankruptcy and the District Judge were correct in their rulings and orders and should be sustained.

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